IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

GOODRX, INC., Plaintiff,	)	April 30, 2024
-versus-	)	9:24-MC-126
	)	Charleston, SC
FAMULUS HEALTH LLC, Defendant.	)	

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE BRUCE HOWE HENDRICKS
UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

For the Plaintiff: ANTHONY W. LIVOTI, ESQ.
J. THOMAS McBRATNEY, III, ESQ.
Murphy and Grantland
PO Box 6648
Columbia, SC 29206

DAVID J. LENDER, ESQ.
JENNIFER M. B. CROZIER, ESQ.
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

For the Defendant: JULIANNE FARNSWORTH, ESQ.
LAUREN N. VRIESINGA, ESQ.
Moore and Van Allen
78 Wentworth Street
Charleston, SC 29401

For the Intervenor: STEPHANIE G. FLYNN, ESQ.
Fox Rothschild LLP
2 W. Washington Street, Suite 1100
Greenville, SC 29601

ELLIE J. BARRAGRY, ESQ.
Fox Rothschild LLP
33 South Sixth Street, Suite 3600
Minneapolis, MN 55402

Court Reporter: KAREN E. MARTIN, RMR, CRR
PO Box 835
Charleston, SC 29402

Proceedings reported by stenographic court reporter.
Transcript produced with computer-aided transcription software.

Tuesday, April 30, 2024

(WHEREUPON, court was called to order at 11:04 AM.)

THE COURT: Thank you. Good morning. Take your seats, please.

All right. Good morning.

ATTORNEYS IN UNISON: Good morning, Your Honor.

THE COURT: Before we get started, let's just start from left to right and everybody introduce themselves for the record and for the court reporter.

So I'm looking right at you, yeah?

MR. SZWAJKOS: I'm Michael Szwajkos.

THE COURT: Okay.

MS. FARNSWORTH: He is the client, Your Honor, not an attorney.

THE COURT: He looked like a lawyer for a second. Sorry about that.

MS. VRIESINGA: Good morning, Your Honor. Lauren Vriesinga for Famulus Health LLC.

THE COURT: Thank you.

MS. FARNSWORTH: Juliannne Farnsworth for Famulus Health.

THE COURT: Good morning.

MS. CROZIER: Good morning, Your Honor. Jennifer Crozier on behalf of petitioner, GoodRx, Inc.

THE COURT: Okay. Thank you.

MR. LENDER: David Lender from the law firm Weil Gotshal for the claimant GoodRx.

THE COURT: Okay.

MR. LIVOTI: Good morning, Your Honor. Anthony Livoti from Murphy and Grantland. And I have my partner, Thomas McBratney here with me. And we are local counsel for Mr. Lender and Ms. Crozier.

THE COURT: Okay. Great.

And now back row, left side -- well, your right side.

MR. FLYNN: Good morning, Your Honor. Stephanie Flynn. I'm with Fox Rothschild on behalf of -- local counsel on behalf of the intervenor, Prime Therapeutics.

THE COURT: All right. Thank.

MS. BARRAGRY: Good morning, Your Honor. Ellie Barragry with Fox Rothschild on behalf of the proposed intervenor, Prime Therapeutics, LLC. I'm also joined by the senior general counsel of Prime Therapeutics, Anna Petosky.

THE COURT: Thank you. Welcome everybody to Charleston. We're here this morning for the motions that have been filed in Case No. 24-CV-886, Famulus Health LLC vs. GoodRx, Inc. And I've consolidated the instant matter with Case No. 24-MC-126. And so we've got these pending motions to be heard.

And just to give you kind of an overview, 10,000 feet, I'd like to hear first from Famulus on its petition to vacate the arbitration award. And then I'll hear from GoodRx, who filed the response in opposition, and then also a petition to confirm the award in the 24-126 matter. And then I'm going to hear from Prime Therapeutics on its motion to intervene in this matter. And then from GoodRx, because I understand it opposes Prime's motion. And then lastly, I'll hear from Famulus and then GoodRx about the pending motions to seal various documents from the underlying arbitration matter that have been attached to the petition to vacate.

So I'm assuming that sounds good with everyone. Otherwise they'd be jumping up and down. And otherwise I'm not going to ask if there's anything else we need to take up unless there's something really critical. Anybody got anything?

MS. FARNSWORTH: Your Honor, I just want to put on the record that we had asked for a status conference so we could obtain a scheduling order. But in light of what you just said, we're going to hear everything today here?

THE COURT: Yes.

MS. FARNSWORTH: Okay.

THE COURT: So let's hear first from Famulus on its petition to vacate the arbitration award.

MS. FARNSWORTH: Your Honor, just to put this in context, I know we've presented our petition to vacate and amended petition but I just want to give you a brief background about the case. My client, Mike Szwajkos, is the founder and President of Famulus LLC. Famulus LLC is a company that works in the pharmaceutical industry. It's very complicated. We spent the last year going over the different facts, but I'm just going to give you the brief version.

His company operates as an in between for people like Prime or people like GoodRx to try to help them get from the client, who has the prescription, to the pharmacy. And the goal is to try to maximize the best price you can get.

So in this case, Your Honor, in 2020, my client founded Famulus LLC. He's the sole founder and owner. There are some other LLC participants. After that, in July of that year, GoodRx, who is a national company, wanted to get involved in some more areas with integrated cash because they had not done it before. And when I say integrated cash, that's just a method of what you do to try to put the prescription and the people together. So it gets more complicated than that, but just so you'll know there's integrated cash. There's discount card, which is what GoodRx had been doing in the past.

So they decided because of my client's expertise in the area, for 25 years he had worked for numerous companies and had been involved in that area alone, they wanted to have his company, Famulus, help them as a distributor to try to bring more people into the GoodRx family. And by doing that, GoodRx would make money. Famulus would make money. But he would be the person out in the field to trying to get people to sign on to GoodRx. And it was entering into this agreement that you have a copy of in good faith, it was believed by Famulus that GoodRx had his company's best interests, he had their company's best interests.

It was apparent after several months that that was not the case. And Famulus had tried to bring, as part of the distributorship agreement, a deal with Prime therapeutics to GoodRx. And this deal would have meant a lot of money for Prime -- I mean, a lot of money for GoodRx and some money for Famulus. And it was going to be a good deal for all three concerned.

And GoodRx told Famulus all the time they were in good faith considering the idea, considering the offer. Then one day just out of the blue, they said, I'm sorry, we're not going to go forward with the Prime deal. But by the way, you can't go forward with any working with Prime either because of our agreement.

My client, Famulus, terminated the agreement for cause. And then later proceeded to enter into an arrangement with Prime that had nothing to do whatsoever with GoodRx or any of the information that they allege that my client had obtained from GoodRx.

In February of 2023, GoodRx filed a demand for arbitration. That demand for arbitration only asked for two things. It was a breach of contract claim. It said that Famulus had violated the confidentiality provision of the agreement. And it said that Famulus had violated the exclusivity part of the agreement.

During the course of February through June, we were trying to select an arbitrator. We submitted discovery. There was discovery delays. There were thousands and thousands of documents. We finally had an arbitrator selected. But, Your Honor, as you'll find, and I may not get into all of it right now, but all the exhibits that we have submitted to you will show that during the course of that time, the arbitrator from the beginning was not fair. And all the actions that she took were prejudicial to my client and to the case.

So the most important thing I want to tell you about is pre-hearing malfeasance. In the statute, statute 9 of the Federal Arbitration Act, they have a provision that has four grounds of what you can ask for a court to

vacate. We know it's a high standard. GoodRx submits to the Court that the only standard is if the arbitration is held, then that's all you have to do. But, Your Honor, we argue in advance that's nonsensical. Because if that was the case, the Federal Arbitration Act would not have provided provisions where you could get an award vacated, or modified, or set aside.

And Your Honor, in this particular provision of the Federal Arbitration Act, one of the grounds specifically says, Part 3, Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior which the rights of any party have been prejudiced.

So, Your Honor, most importantly, first thing, other things happened. But the most important first thing that the arbitrator did wrong, both parties, GoodRx and Famulus, submitted a consent request, joint consent request to the arbitrator saying we were not -- we're not going to be ready for a hearing on November 27th. We have good reasons and we submitted the good reasons. Discovery wasn't complete. We had depositions to take. Numerous other sufficient cause shown. And without even -- two hours after we asked it by email, the arbitrator says, No.

I have it on my calendar. I told you when we set the date that I was not changing it for any reason. Denied. Your Honor, Famulus even asked for her to reconsider her decision. And she said no. So that was the first wrongdoing that she did.

And so as a result, we're scurrying around. We even said, We have an available date in April of 2024. We looked at her calendar. We said, We don't want to be any inconvenience to you but we're just not ready for a hearing at this time. She said no.

We proceeded. We took numerous depositions. We exchanged numerous documents. We still were not ready for the hearing. There was still outstanding discovery, outstanding subpoenas that had not been issued. I mean, and part of reason we wanted to fully brief this more is to give you examples of all the things that we needed to do.

Famulus goes back to her before two weeks before the hearing and says, Your Honor, A-B-C-D-E-F through Z, we are not ready for a hearing. We respectfully ask for a continuance. Prime had submitted a letter saying they would like to submit someone on the issue of the injunction and whether or not the injunction should issue. Again, without any reason, she just in an email said, No. No.

And Your Honor, the reason this is so prejudicial and the reason it's in the statute is because if you're not prepared for a hearing and the statute -- and the AAA rules say that you can ask for a request at any time, and this says that if sufficient cause is shown, then the arbitrator should, shall continue it.

Your Honor, the weekend before the hearing we were traveling to Hilton Head. And the arbitrator is still issuing rulings excluding lay witnesses, excluding expert witnesses, excluding rebuttal witnesses, telling Prime that they can't bring Marci Conlin to come testify. So, I mean, there's just so much more I could tell you about it. But just for you to know now, there is ample evidence to vacate this award just on that fact alone. But we have other facts.

So in a nutshell, in summary, the arbitrator on two occasions refused to continue the hearing. And as a result, my client did not receive a fair and just award.

THE COURT: Isn't it a may not a must in terms of the arbitrator? She's got discretion to postpone a hearing upon a request?

MS. FARNSWORTH: Well, it says -- what it says here doesn't say may or must or shall. It says, Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown. And

that is the ground, if you look under Title 9, Section 10, Subsection A3, In any of the following cases, the United States may make or you may make an order. But she didn't have the discretion. You have the discretion, may. But I don't believe the arbitrator has the discretion. Because it doesn't say in here if the arbitrator decided it wasn't a good idea, or if it didn't fit her schedule, or if she wanted to make sure she received her fee for the year, then she's just not going to continue it regardless of what's happening with the evidence in the case and regardless of the fallout that's going to occur to the parties.

And Your Honor, it's -- additionally, it's not discretionary if it robs Famulus of a fair hearing and that's what we allege happened in this case.

So this is -- and another thing that happened that we think is very important, it was a manifest disregard of the law. There were other parties involved besides GoodRx and Famulus. We were the only two parties, these are the only two people that were part of the distributorship agreement.

But, for example, you've heard from Prime. You're going to hear from Prime later. They believe they have a right to be involved in this case. There are other parties, Express Scrips is one of them. And when I told

you earlier that GoodRx just out of the blue one day said, oh, we're not going to do business with Prime, Mr. Famulus. So you're just going to have to go do your own thing, you just can't do it with them either.

Well, there was another company called Express Scrips. And in the hierarchy of these pharm -- it's called PBMs, pharmaceutical benefit managers. So they have tiers. They have Tier One, which is Express Scrips, Prime, other people. And then you have different tiers.

So Express Scrips, who GoodRx is in contract with right now, they're the ones that said you're not going to do work with Prime because they're in our tier and they're going to compete with us.

So, Your Honor, from the very beginning of discovery, the very first request for production and interrogatories we submitted to GoodRx, we said we'd like every document you have about Express Scrips and WellDyne. And we'd also like to take their deposition, that was later. And we'd also like for you to tell us what involvement they had at all with the decision not to go forward with the Prime deal. Every time we received a response, it said this is not relevant and/or either we're still investigating all the time.

So, finally, after receiving two of those responses, we submit to the judge that we would like a

non-party subpoena to Express Scrips and WellDyne. This is routine. GoodRx had already gotten a non-party subpoena for someone that they believed had some information. Within -- instantly, GoodRx objected for no reason. They were saying, GoodRx said it was not relevant even though that's not for them to decide. We briefed this extensively with the Court. We told her why it was relevant, why we needed it.

And then she said, okay, I'll let you narrow your subpoenas. So we narrow the subpoenas. And immediately, GoodRx says no, they are still not relevant. I mean, and we told the judge, Your Honor, why don't you just do an in camera review? Why don't you look at it and decide instead of letting the other side say it's not relevant?

Your Honor, this went on from June until November going back and forth, going back and forth. Finally, eight days before the hearing she said, okay, narrow it one more time, I'll send it out. We didn't even hear from WellDyne before the hearing. And we heard from Express Scrips and, you know what they said? We don't recognize that subpoena. We don't recognize the arbitrator having authority to even issue a subpoena.

So then we asked her if we could take the deposition. If they weren't going to give us any

documents, because we knew how important it was to get the information from Express Scrips because one of their documents that they accidently submitted to us was a PowerPoint that talked about how they were meeting with Express Scrips, not only about Famulus, but about Prime. And so it's like the smoking gun right there.

But anyway, so we never got any documents from Express Scrips. And we got a few documents from WellDyne after the hearing. So, Your Honor, just those two things alone, by failing to continue the hearing, by failing to allow Famulus to engage in meaningful discovery to non-parties, just those two things alone prevented Famulus from having a fair hearing.

All right, Your Honor, and during the hearing, I think we've alluded to some in our briefs, but there were also things during the hearing. Let me just talk about the witnesses. I mentioned this earlier.

We -- GoodRx submitted their experts' reports. We submitted our experts. They objected. The judge struck our witnesses and said no rebuttal witnesses. She would not allow our experts unless we had -- unless we -- she would not allow them. So that tied our hands at the beginning of the arbitration hearing. So we're not allow to have the witnesses.

And all throughout the hearing, this is an

example of sour grapes, which is things that prevented us -- like, for example, no dispositive motions. We had a scheduling -- consent scheduling order of what was going to happen when.

THE COURT: Let me circle back a second, please. You're going like 90 miles an hour.

MS. FARNSWORTH: I'll slow down.

THE COURT: That's okay. I represent the court reporter here.

THE COURT REPORTER: Thank you.

THE COURT: I've got to live with her. So I'm going to circle back for a second. Why were those three party documents material to the dispute that was before the arbitrator?

MS. FARNSWORTH: You mean the non-party documents? Your Honor, they were so material because we had counterclaims. We had counterclaims against GoodRx. One of them was for the breach of fair dealing and good faith. One of them was for interference with contractual relationships. We had four counterclaims, over and above our defenses.

And we couldn't find out why -- we knew that GoodRx had acted in bad faith. We knew -- we heard in the industry rumors that it had something to do with Express Scrips. They were telling us -- we did a search and it

just never came up.

But then when they produced this document that they called Project Echo. It was a confidential, internal GoodRx document that they submitted to their officers that were working on this team. And in it there's all these different scenarios. And it says what they wanted to do was do business with Prime and get Famulus out of the picture so they would receive all of the revenue versus his portion. So this was a 40-page document. And it says all these different little pictures and words that said, A, we'll work with Famulus; b, we'll get Famulus out but we'll work with -- but all along it was working -- it was the deal with ESI, Express Scrips.

If we had seen those documents when we started defending the arbitration, it would have made all the difference. If we could have taken a deposition of someone from Express Scrips and asked them point blank, did you or did you not tell GoodRx that they could not do business with Famulus if Famulus was going to do business with Prime? If we had found that out, that would have made all the difference. And it would have probably allowed us to have a dispositive motion for -- on some of the defenses and claims that we had to defend against.

So, I mean, I can go on and on why it would have made such a difference. But we never received those

documents. We never got to take their deposition. And then they just thumped the nose of the arbitrator. I mean, she finally, after months and months of wrangling, said she would submit a narrowed, reduced version.

So that was the two main things pre-hearing. During the hearing she didn't allow us to have the witnesses we needed. She excluded rebuttal witnesses for the expert, Your Honor.

And then post-hearing, this is where it gets a little more testy. So in AAA, it says that we're going to close the hearing and then that's going to be it. You can't have any contact with the arbitrator. So we already had a scheduling order that we were going to have the hearing from November 27th until December the 1st. And then there was going to be a time for us to submit post-hearing briefs. And then there was going to be a time for the case to be closed and her to issue her order.

We submitted post-hearing briefs. And at that time, without any solicitation or request from the arbitrator, GoodRx submitted a proposed order that we objected to immediately. In that proposed order were two very important things. It was a definition of Solutions; Solutions being the area that Mr. Szwajkos and Famulus could work in. It also had parties that had talked about it was going to be enjoining against not only Prime but

other parties. And then it also talked about how broad it was, like who you could and could not do business with. And, Your Honor, if you take it at face value, even the lawyers who worked on the case could not ever do work in the industry.

But, Your Honor, the reason that's important, not only did the arbitrator not ask for it, none of the things that were in that proposed order were brought up at the hearing. There's no evidence in the transcript, four and a half days, about any of that. It was just something that GoodRx slipped in there later among some other things that happened before she issued her award on February 16th. The arbitrator just signed it. She signed it even though she, obviously, knew or didn't care that none of the -- there was no evidence to support any of it.

And Your Honor, that's taking me to my next thing. So before we get to the actual injunction and the award, so after that, after she -- we get a AAA email that says, Case is closed. Don't contact the arbitrator. She'll rule eventually. She sends out an email and she said, I just want to ask about damages. I want to ask GoodRx, assuming that the breach did occur, please tell me what your damages would be? Now this is after the case is closed, totally in violation of the AAA rules, totally in violation of good faith from a judicial officer. And then

she allows GoodRx eight to ten days to respond. And then she gives us two days to respond. And Your Honor, the basis of that post-closed hearing information request is what she used for her injunction.

So then we get to the -- and this is an abbreviated version, because we still had so much more we wanted to brief and tell you about. But when the award came out, three different orders. And they weren't put together. Like, the injunction was not an exhibit to the award. We just received a AAA email on a Friday afternoon that said, Judge Ray has ruled and here are the three orders. One order was an injunction that didn't go -- didn't say it went to anything relating to the award. One was an award. And one was an order for costs.

I'll talk about the order for costs just because it's clearly prohibited. In the agreement between GoodRx and Famulus, there is a provision that talks about arbitration. It says it will be a single arbitrator. It will be held in the residence of Famulus. And each party will pay its own costs and fees. That's black letter law in the agreement. Therefore, the order for costs is a violation.

Secondly, Your Honor, the award is internally inconsistent. But what's most important, it's inconsistent when you look at the injunction. And the

injunction is the most important thing we want to talk about now today. And I think that's what Prime is here to talk to you about.

Your Honor, first of all, the injunction is based on a proposed order language that no evidence was submitted at the hearing to support it.

Secondly, it is so inconsistent. At one time it says we're enjoining for breach of the confidentiality. Then she's saying we're enjoining for the breach of the exclusivity, which is totally in violation of what she put in the award language.

And Your Honor, finally, the breadth and the scope of the injunction, which we've briefed some but we could add more, is impossible to enforce. I mean, if you take the injunction at face value, it says that Mr. Szwajkos and anyone who has ever been associated with Famulus is never going to be able to do business in that space again. Not only for integrated cash, which is what GoodRx and Famulus contracted about, but discount cards. If you read it, it's almost anything.

And then, Your Honor, it goes on to say that we're going to require Famulus within five days of this order, before it's confirmed, before it's argued before a federal judge, we're going to say five days, Famulus has to notify A-B-C-D-E-F companies that it can no longer do

business with them. Immediately. And when you do, you have to let GoodRx know. Well, Your Honor, that's why Prime is here. Prime is one of those A-B-C-D companies. So this order that has nothing to do with any of these other companies, whose names did not come up at all in the discovery, the judge just -- she got it from the proposed order. She just signed the proposed order like it said. It had nothing to do with anything.

So, Your Honor, if this award and injunction is allowed to stand, first, it can't because it's just so inconsistent. It's unenforceable. The scope is too broad. And we would -- and it has totally deprived my client for public policy reasons, constitutional reasons, and other reasons under the Federal Rules of Civil Procedure of a fair trial and a just hearing.

THE COURT: Okay. Thank you.

Yes?

MR. LENDER: I'll come up to the podium, if that's okay.

THE COURT: That's fine.

MR. LENDER: Thank you. Good morning. Again, David Lender for the petitioner, GoodRx.

After a weeklong hearing, in which the arbitrator heard testimony from nine witnesses and admitted dozens of exhibits into evidence, the arbitrator

found that Famulus breached its exclusivity and confidentiality obligations owed to GoodRx under the parties' agreement by developing and selling a competing product based on GoodRx's confidential information. And to remedy those breaches, the arbitrator awarded damages to cure the past and an injunction to prevent future misuse of our confidential information going forward.

Now, as Your Honor knows, a motion to vacate an arbitration award is not an opportunity for the loser of the arbitration to relitigate the merits. And I think a great majority of what I just heard from Ms. Farnsworth is literally re-litigating the merits. As the Fourth Circuit has made clear, convincing a federal court to vacate an arbitration award is a herculean task. The scope of review of an arbitrator's decision is extremely narrow, exceedingly deferential, and among the narrowest known at law. Because to allow full scrutiny of such awards would frustrate the purpose of having arbitrations at all. And that comes from Warfield, the Fourth Circuit decision.

Further, when reviewing an arbitrator award, a court is limited to determining whether the arbitrator did the job they were told to do, not whether they did it well or correctly or reasonably, but simply whether they did that, whether they did it. And again, that comes from the Fourth Circuit decisions of Warfield, Three S Delaware,

and Your Honor's own decision in the Wells Fargo case. Here, there can be no real question that the arbitrator, a well respected former judge with more than 20 years on the bench, did the job she was asked to do.

In its petition to vacate, Famulus comes nowhere close to presenting the exceptional case for overturning an arbitration award. Instead, what Famulus did is they identified essentially every possible ground for vacating, and offered only general, unsupported grievances in its petition to vacate; exactly what you saw in Wells Fargo. Then they failed to file any reply brief to our opposition to the motion to vacate. And they failed to respond to our motion to confer. Thus, Famulus did not meet its heavy burden to demonstrate that the arbitration award should be vacated and, accordingly, it must be confirmed.

Now, I think recognizing this, they effectively sought a do-over because they filed an amended petition after the briefing on the motion was complete. And normally, once a motion is complete, you just don't get a do-over. But that's what they tried to do here. Famulus proceeded at its peril when it failed to raise its arguments on the merits in its petition. And the Court could confirm the award on that basis alone.

However, if Your Honor's going to consider the arguments that were made in the amended petition,

basically the do-over motion, it comes nowhere close to meeting Famulus' heavy burden to vacate the arbitration award. Your Honor, I'd like to just briefly walk through the different arguments so we can at least have our response on the record.

The first issue they raise is manifest disregard of the law. Ms. Farnsworth didn't make that argument here before you but it is in their papers. The Fourth Circuit has made clear though in Jones that the manifest standard is not an invitation to review the merits of the underlying arbitration or to establish that the arbitrator misconstrued or misinterpreted the applicable law. Rather, appellant is required to show that the arbitrator was aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it. Or the way -- I think the way Judge Duffy explained it in United States vs. Pete Brown And Associates, 771 F.Supp.2d. 576 at 585, is a nice articulation of the law. What he said is, Even if a federal court is convinced that the arbitrator made the wrong call on the law, on the contrary, the award should be enforced despite a Court's disagreement with it on the merits if there's a barely colorable justification for the outcome reached, barely colorable justification.

Here, we submit the arbitrator got the law

right. But certainly, there was at least a colorable justification for the outcome reached. And nowhere, nowhere does Famulus point to some binding precedent that the arbitrator recognized but disregarded. Instead, what the arbitrator did here is what arbitrators and courts do all the time. They awarded damages for the past breaches and an injunction to prevent future breaches.

It's also wrong for Famulus to suggest that somehow the arbitrator did something wrong because they didn't lay out in the opinion all the four factors for the injunction. Both parties provided extensive briefing on the issue and spent significant time during the arbitration on the issues pertaining to the injunction.

And the law is clear, and the Fourth Circuit has been clear, and the Supreme Court has been clear that an arbitrator has no obligation to the court to give their reasons for the award. United Steelworkers, Supreme Court; Wachovia, Fourth Circuit. In fact, as the Fourth Circuit held in Warfield, 26 F.4th at 673 to 674, Of course, arbitrators are not required to explain their reasoning. Instead, when arbitrators do not explain how they reached a given result, the party seeking vacatur must show that it would be manifest disregard of the law to reach that outcome by each and every conceivable route. Famulus comes nowhere close to meeting that heightened

standard here.

The next thing you heard is about these procedural rulings that the arbitrator made that Famulus claims deprived it of a fair hearing. But as the Fourth Circuit held in Wachovia, Arbitrators, quote, Have broad discretion to set applicable procedure; and quote, An arbitrator's procedural ruling may not be overturned unless it was in bad faith or so gross as to amount to affirmative misconduct. That's 671 F.3d 472 at 479. Here, each of the procedural rulings Famulus points to were well within the arbitrator's discretion or really the -- their own making. It was the making of Famulus' own behavior.

And I'm going go through the different procedural issues that she addressed. The first is this issue about whether they were going to be allowed to call five late-identified witnesses, two of whom they claim are these hybrid, lay-expert witnesses. Well, Famulus provided no expert reports for those two hybrid witnesses. And the arbitrator also found that Famulus had failed to disclose the five witnesses during discovery.

Nonetheless, the arbitrator ultimately ruled that Famulus could call any of those five witnesses as long as they first put them up for a deposition. And then Famulus decided just to put two of them up for a

deposition. We deposed them both. And they both appeared and testified extensively at the hearing.

The folks that she's now complaining about, this second expert, Kuemar, and the Prime witnesses -- witness were two witnesses that they chose not to put up for a deposition. They had them on the list. And then they pulled them down and didn't put them up for a deposition. So the arbitrator said, well, yeah, you can't call them as witnesses at the trial. That was the deal.

So what they really are complaining about now is, what ended up happening is after they identified the two witnesses, we deposed them, they were allowed to testify, the night before the hearing, they said, you know what, we've changed our mind again. We now want to call the Prime witness that we pulled down earlier. And the court and the arbitrator said that's just not fair. You can't bring in a new witness the night before the arbitration.

And that's exactly what the Fourth Circuit faced in the East Fire case. What the court found there is that, in addition to violating the rules on witness disclosure and the court's prior orders, the limitation, quote, was necessary to prevent undue prejudice to GoodRx that would have resulted from Famulus' failure to disclose its proposed evidence. Nonetheless, during the hearing,

Mr. Szwajkos was allowed to testify extensively about his interactions and Famulus' interactions with Prime, which the arbitrator actually noted during the hearing at transcript at 12/20 to 12/22.

Okay. Next one up is the third parties, ESI and WellDyne, that they weren't allowed to call at the hearing. But again, Your Honor, that was the exact same issue. Famulus raised this issue on calling -- getting these folks subpoenaed to appear at the hearing on the Saturday before the hearing, so less than 24 hours before the hearing as part of a last-ditch effort to seek a continuance. And that document is at the amended petition Exhibit 44. But again, the arbitrator there was well within her discretion not to subpoena third parties to appear at the arbitration less than 48 hours before the hearing was about to begin.

Now, you also heard they're complaining about the fact that the arbitrator considered a draft injunction order provided by us and that she ordered supplemental briefing on one issue. But it's common practice to submit draft orders as part of your submissions, this is the injunction we were seeking, and for arbitrators to ask for additional briefing based on the evidence presented. It's also permitted under the rules, Rule 41. And Famulus had the opportunity to respond to the additional briefing,

which it did, and to respond to the proposed injunction, which it chose not to. It literally provided no response. Nothing. That was their decision.

Okay. So the next thing you heard is the -- oh, the last thing is this issue about this inconsistency with the award and the injunction. There's one paragraph, the first paragraph of the injunction, which is inconsistent with the award. And we've been clear. We've been clear the whole time. We've been clear in papers. And I'll be clear here on the record. We are not seeking to confirm or enforce that first paragraph of the award.

Okay. The next one is the misconduct in not postponing the hearing. First of all, Your Honor, it is absolutely a may standard, as you noted. We cited the El Hadad case, 485 F.Supp.2d. at 677. It's also in Rule 31, it's a may standard. The arbitrator here was clear, very clear that the arbitration was a firm setting and would not be postponed. That's Exhibit 13 and Exhibit 21 to our petition to confirm. And it is well within the arbitrator's broad discretion to set applicable procedures, adhere to established schedules, and to prevent unnecessary delays.

The only prejudice that Famulus identifies in their briefing on the decision not to postpone are these documents that they couldn't get from ESI and WellDyne.

But, Your Honor, it was their own lack of diligence that resulted in the delay of the issuance of those subpoenas. They served overbroad subpoenas. We objected. The arbitrator agreed and they were ordered to narrow them. And they were the ones that waited six weeks before submitting the revised subpoenas. That's on them. That's not on us.

And Your Honor, when Ms. Farnsworth said, well, we never heard from WellDyne, you heard that today, well, if you look at Exhibit 37 attached to our petition to vacate, they represented that WellDyne had said they would respond to the subpoena if the arbitrator just issued it, which the arbitrator did. And then WellDyne didn't produce the documents. So they represented that WellDyne wouldn't respond. WellDyne just chose not to. And as you heard, ESI did the same thing.

You had asked, Your Honor, how this stuff is relevant? It's actually, our position is it's really not. The arbitrator asked and recognized repeatedly. She questioned the importance and relevance of these materials.

One example is her August 7th, 2023, correspondence, Exhibit 19. And Your Honor, if you look at the decision, the decision tells you that the ESI information is not relevant. Because what the judge, the

arbitrator ultimately concluded was that Famulus had breached the agreement well before there ever was ESI on the scene. So what happened subsequently with ESI had nothing to do with the breach that she was remedying through her damages and her injunction award.

The last thing that Famulus complains about is the arbitrator awarding certain costs and fees.

THE COURT: What about Famulus' counterclaims?

MR. LENDER: The counterclaims, yes, the four counterclaims? The four counterclaims, one was breach of the implied covenant of good faith and fair dealing, one was a disparagement claim, a defamation claim, and a -- like a negligent -- I think it was, like, a tortious interference but a negligence counterclaim.

The reason why they claim they wanted the ESI information is because they wanted to argue that we subsequently entered into an agreement with ESI that had exclusivity. But the arbitrator recognized that the subsequent agreement had exclusivity. It was part of the evidence that was presented to the court. What the arbitrator found was that had -- that the breach occurred well before there ever was an ESI on the scene.

Or to say it a different way, what the arbitrator found was that had Famulus not breached, we would have entered into the agreement well before there

ever was an ESI. So the subsequent ESI conduct and information was completely irrelevant to the claims. It certainly had nothing to do with our breach claim. And it had nothing to do with their counterclaims based on the evidence that was presented that, again, the exclusivity was not -- the subsequent exclusivity agreement or ESI was part of the evidence. So there was no need for this additional information.

As I said, ESI took the position that they were never responding to that subpoena. Right? And under arbitration rules, you actually can't compel a third-party to produce documents in response to a subpoena. That's what they did. ESI undisputedly said they were not going to respond. There was no jurisdiction over them. So the fact that the subpoena got issued, ESI was clear they weren't going to produce the documents anyway. And that's Exhibit 50 to our petition to confirm.

Real briefly, Your Honor, the last thing is the issue of costs. The arbitrator imposed costs for those two depositions that they were allowed to -- for the late witnesses and as a sanction for failure to comply with certain discovery orders. No question, absolutely permitted under Rule 24 and Rule 60 of the AAA rules.

The last thing which we just heard is that, well, the agreement doesn't allow for the recovery of

costs. The court concluded -- the arbitrator concluded that under the agreement, as well as for sanctions, she could award the costs of the arbitration not attorney fees. We were just talking about costs.

And part of the rationale for that, just so we're clear, is Famulus asked for the costs of the arbitration as part of their case. So when the arbitrator was interpreting the agreement, whether it was her interpreting the agreement or as a sanction, the fact that they asked for costs as well, it was completely within the scope of her interpretation to decide that the agreement allowed for it.

And, Your Honor, Oxford Health, Supreme Court, this is incredibly how narrow we're talking the scope of review is. The question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether she construed it at all. That's the standard based on the Supreme Court, 569 U.S. 564 at 573.

So, Your Honor, this is not an opportunity to relitigate the case. It's a very narrow review. And there is no basis for vacatur. And based on the law, Your Honor, if there's no basis for vacatur, the law says you must confirm. So we'd ask that you confirm the arbitration award and allow us to proceed with enforcing the award. Thank you.

THE COURT: All right. Thanks.

All right. I'm ready to hear from Prime on its motion to intervene.

MS. FARNSWORTH: Your Honor, can I not say anything in response to that? Or are you going to do that at a later time? I mean, I'd like to. At least the record needs to show that I don't know if Mr. Lender, with all due respect, was in the same courtroom as we were today, but just a few things I want to point out.

One, I did talk about manifest disregard of the law. Secondly, when they talk about that the arbitrator only has to do the job that they were to do was to have the arbitration. Well, Your Honor, we concede it's a high standard, but it's not an impossible one. And what the arbitrator's job to do in this case was to look at the agreement between Famulus and GoodRx and decide whether or not any of the terms had been breached. She didn't do the job she was assigned to do. She went over and above that.

And Your Honor, I just can't let this stand any longer, because they said this in their brief and it's just not true. Express Scrips -- we went back and forth for four months, and I'll be glad to supplement information if the Court would -- I will show you how I requested the subpoenas. They kept getting objected. I revised them. They objected. We didn't wait six weeks to

send the subpoenas. We waited until the judge said she was going to issue them.

And I did say that we received words from WellDyne. And what I said this morning was that WellDyne gave us their documents after the hearing. I did not say we never heard from WellDyne.

So, Your Honor, there's lots of misrepresentations. There's lots of information that you need to know, but the most important is this. GoodRx has already asked for modification. They concede, they conceded in here this morning that the award on its face has defects. So they're asking you for a modification. We're asking you to review it for a vacatur or modification. So it seems like just the fact that they're asking you for it and we are that it needs to be done.

Thank you, Your Honor.

THE COURT: Thank you.

All right. So I'll hear from Prime.

MS. BARRAGRY: Good morning, Your Honor. Again, Ellie Barragry with Fox Rothschild on behalf of the proposed intervenor, Prime Therapeutics. Thank you for the opportunity to speak our motion to intervene in this action. I would like to provide a brief background regarding Prime, the MedsYourWay Program, and how we got here today, and then jump into the elements of

intervention.

One threshold issue that came to light through the briefing is the issue of subject matter jurisdiction. I think every party in this room would prefer to be in this room and in this court. But the FAA does not confer jurisdiction over this dispute. There must be independent jurisdiction.

The parties have asserted diversity. But neither GoodRx nor Famulus has sufficiently pled the citizenship of all the parties and that diversity actually exists. As a matter of crossing our Ts and dotting our Is, I do think that's an issue that needs to be established and confirmed before there's any ruling on the merits.

So Prime is a pharmacy benefit manager, which means it's a third-party administrator for prescription drug programs for its paired clients, primarily for not-for-profit Blue Cross Blue Shield health plans, as well as self-funded employer plans, and union group plans, and third-party administrators.

So what does that mean? So as an individual, you have your health plan, you have your health insurance. And within that health insurance, you'll have your prescription benefits. Prime, on behalf of its clients, administers those prescription benefits. So Prime

contracts with pharmacies to build out the networks that are the pharmacy networks. Prime works with physicians to create the drug lists that are covered under your health plan. And Prime negotiates with drug manufacturers to reduce drug costs for Prime members.

Now, while these are typically the functions of those associated with PBMs, PBMs have many functions. Relevant to this dispute, it's also important to understand drug discount cards or drug discount card programs.

So we'll take GoodRx, for example, which we've heard some things about today. And I'm not going to go into the weeds of how it works, but at a high level, essentially GoodRx negotiates to get access -- negotiates with certain healthcare entities in the market to get access to discounted rates on pharmaceutical drugs.

So, for example, my middle child was diagnosed with strep throat last week. So I am going to go into the pharmacy with my health insurance card. And I'm going to get from the pharmacy told what my insured price is for that amoxicillin. And say it's $10. And that is the insured price that's going to be my copay. That's going to go to my deductible. That's going to go to my overall healthcare costs, my maximum out of pocket.

Drug discount cards, like what GoodRx offers, is

they have negotiated and found access to discounted price, these unfunded options. So I can look on GoodRx's website and see they actually have access. And I could pay $3 for that same amoxicillin.

Now, what that means, though, is if I go through GoodRx independently, I'm not going through my insurance. So my insurance doesn't know I got that prescription. My insurance doesn't know I paid $3. It's not going to go to my deductible. And it's not going to go to my maximum out of pocket. I get that benefit of a lesser price, but it doesn't reduce my overall healthcare costs and its offset because there's this lack of integration. That's what we're hearing about today, this integration between the drug discount card programs and then the process at point of sale.

And GoodRx is one drug discount card player in the market. There are numerous other drug discount networks available. Now, a fair amount of people don't know about drug discount card programs. So you have to know about those programs, and you also have to have access to it. And every time you go in, you'd have to compare your funded price with the unfunded price and then decide which way you're going to go. And then it's not going to go towards, like I said, your deductible, you maximum out of pocket.

So back in 2020, what Prime wanted to do was incorporate these drug discount card programs into the point-of-sale process. And it started with its mail order, its home delivery. So it worked with Amazon Pharmacy to incorporate these drug discount card programs into the actual purchasing process online.

Jump forward a year later in 2021. Prime wanted to incorporate the drug discount cards into the pharmacy patient's member at the retail counter. So that's when Prime was introduced to Famulus, in July of 2021, as a company that was aggregating drug discount cards, and as a company that could help Prime build out its vision of integrating these drug discount cards into a benefit for its members. That vision is what we now call MedsYourWay.

So what is MedsYourWay? So how does that change your member experience? So in my amoxicillin example, as opposed to me going in and getting the price of $10, I'll go in and I will provide my insurance information. At the point of sale instantaneous my price is being compared against all these unfunded options as well. And based on Prime created rules, then what comes back at the pharmacy counter is here's the lowest price available. It might not be your insured price. It might not actually be paid by your insurer. But you can pay it and you could buy it for $3.

But the benefit here is Prime was a part of that process. It now knows you paid $3. It knows you got that prescription. And it can use that, it can go towards your deductible. It can go towards your maximum out of pocket. It provides that information for better drug management.

There are things called safety edits where Prime, when it has access to all of your prescriptions, that's a safety edit where it will have a notification if you're taking drugs that have adverse reactions or you shouldn't be taking at the same time. Now, you have your doctor that's also doing that, but it's another safety edit that your pharmacy benefit manager does through your benefits. It's trying to track those safety edits.

So MedsYourWay launched in August of 2022. So as I said, we were introduced to Famulus in 2021. So it took about over a year from execution of the agreement to actually launching of the program. It took a lot of time, effort, and resources to launch the MedsYourWay program. There are currently over 6 million patients with access to MedsYourWay. And from December 2023 through February 2024, MedsYourWay allowed patients to save approximately $16 per prescription, translating to over $50 million in member savings and over $12 million in plan savings. Now, Famulus is the switch vendor that Prime uses to allow MedsYourWay benefit to function.

Moving forward to this dispute. So Prime was made aware of the existence of the arbitration in September 2023. As part of the arbitration, a dispute arose over the production of Prime's agreement. And Prime has certain rights in its agreement with Famulus to protect that information and make sure it's not disclosed. Through the negotiation of the parties, we were able to put added protections on and make sure that disclosure was limited. And we came to a resolution so that the agreement was produced in the arbitration.

It's through that process that we learned for the first time that Famulus was seeking to shut down Famulus and prevent it from supporting the MedsYourWay program. Because of the threat to the very existence of MedsYourWay, Prime submitted a letter to the arbitrator expressing its concern that the harm to Prime, its patients and its members, was not being considered in this confidential arbitration. All counsel of record was included on that letter. And we were pleading with the arbitrator, Let us be heard on that issue. We didn't have access into what was happening in this confidential arbitration. We weren't there to take sides. Our side was on behalf of the patients and members and the clients that we serve.

Now, in response to that letter, we were told

that the arbitrator indicated she was not going to consider anything that Prime said unless Prime's testimony was under oath at the hearing in accordance with evidentiary rules, which we understood. We started preparing a witness. And we contacted the arbitrator and we said, We will make our VP of Networks available at the hearing. And we would make her available at that hearing.

Now, in response to our letter, even with the understanding that she had asked that Prime have testimony under oath at the hearing, we got a fairly abrupt response, in particular to my partner, Bret Puls, asking to stop contacting the arbitrator, and we were not parties to the arbitration and to stop contacting her.

At that point in time, I mean, we stood by ready and willing to participate at the arbitration, to present a witness on the very real concerns of pharmacy patients and clients. But we were not allowed to present any testimony at the arbitration hearing.

As Your Honor is well aware, then fast forward on February 16th of this year, the arbitrator issued an injunction award that is incredibly broad and far reaching and that enjoins Famulus and anyone associated with Famulus from supporting MedsYourWay, effective essentially immediately, within five days. Thereafter, Famulus filed their petition to vacate. And GoodRx filed its petition

to affirm the award.

Now, Prime has been in contact with Famulus and GoodRx after learning of the award. We've been trying to obtain assurances that we can have continuity of MedsYourWay. That there can be some orderly administration of this. Now, we do take issue with the issuance of the injunction at all. But if it is going to issue, it should have been done in an orderly fashion. It should have been taking into account the harm that is going to instill on these members if they don't have access to MedsYourWay.

We have not been able to reach a resolution amongst the parties. So giving the pressing timelines in this case, we believe intervention is necessary to protect Prime's significant interest. So Prime has filed its motion to intervene in this action as a matter of right, or alternatively, seeks permissive intervention. And as a third alternative, Prime seeks the opportunity to submit its evidence and arguments as amicus.

Now before I proceed to the elements of intervention, I would notice a threshold matter as noted in our brief. Famulus has consented to Prime's intervention in this action so I'll focus on GoodRx's challenges to our intervention.

So Federal Rule of Civil Procedure 24(a)(2)

allows intervention as a matter of right when four factors are met. First, the application is timely. Second, the applicant, Prime, has an interest in the subject matter of the underlying action. Third, the denial of the motion to intervene would practically impair or impede the applicant's ability to protect its interests. And fourth, the applicant's interests is not adequately being represented.

THE COURT: Why can't Famulus adequately represent?

MS. BARRAGRY: So, Your Honor, there are a few reasons that we are concerned with adequate representation. So what the courts look at in that context is whether the interests are the same. We have similar interests but they are not identical. The standard for whether the interests are being represented as described by the Supreme Court, it's a minimal burden to show that your interests are not represented.

Now, Famulus has a very strong interest, as we can hear from Ms. Farnsworth, to vacate the award. We're focused on the injunction and the fact that, one, our interests were not heard as to whether an injunction should have been issued at all and the potential harm on innocent third parties. But two, if you are going to enter an injunction, what does that look like? What is

the process to make sure that any harm to third parties is minimal? That's a separate interest from Famulus. If there's an injunction, I haven't seen Famulus put forward any concern or interests into how an injunction would look if it is going to be affirmed. We have separate interests. It's a very minimal burden to show that our interests are not being adequately represented.

And another point on the adequacy of representation. You know, part of this, again, it was a confidential arbitration. It is a little bit like peeling back an onion. With every brief, we're seeing a little bit more about the arbitration.

I've seen some testimony cited about there being fail safes. It's our understanding that Famulus' founder testified that there are fail safes in place if an injunction is entered. I can tell you that when Prime saw that in the brief, we don't know what fail safes are being referred to. There are no fail safes to make sure that MedsYourWay functions if an injunction is entered. And it's that sort of interests that can't be fully represented if they don't have all the information.

So back to the timeliness of our motion. So GoodRx does not challenge the timeliness of this motion. As I've said, we've been in contact with the parties. GoodRx told us so long as we filed this motion before

April 11th, it wasn't going to challenge the timeliness. We filed our motion by April 2nd.

Agreement amongst the parties aside, I think this case just started. It was filed -- we filed within six weeks after the motion to vacate was filed. I saw that Famulus requested a briefing schedule on its recent application that was filed on Friday. And in addition to the assurances that GoodRx did not believe that our motion was timely, we think we've satisfied that this application was timely.

Now, the next element of mandatory intervention is whether Prime has an interest in the subject matter of the underlying action. The Supreme Court has said that the intervening party must have a significantly protectable interest. Specifically, cases in the Fourth Circuit say that a proposed intervenor has a significantly protectable interest when a party, quote, stands to gain or lose by the direct legal operation of the district court's judgment. There is no dispute that confirmation of the injunction would shut down Prime's MedsYourWay product. Let there be no mistake, it will shut down.

So what does shutting down MedsYourWay mean? That means disruption to pharmacy patient access to affordable medications. Patient access to affordable medications impacts medication adherence. As noted in our

reply, GoodRx itself has published a number of studies emphasizing that exact point. Shutting down MedsYourWay impacts drug management. It can interfere with Prime's ability to perform those safety edits that I was referring to before.

And then we have the irreparable financial harm to clients, members, and Prime. It's unrecoverable. GoodRx emphasizes that Prime doesn't guarantee pricing to members. So what could really be lost? That's almost making the point. That's precisely the point. We don't guarantee prices. So if you shut down MedsYourWay, all those savings, all of those savings by the members, by the plans, that's all lost savings that are not recoverable.

Now, GoodRx attempts to minimize the potential harm to Prime and focuses on trying to distance the issues that can arise if medication costs get higher. But the issue is there's no legitimate dispute that Prime's interest is not contingent, it's not remote. MedsYourWay will shut down under this injunction award.

Now, the practical impairment requirement. The courts look at whether denial would practically impair or impede the ability to protect its interests. Prime has an interest in the continued operation of MedsYourWay. Now, GoodRx argues that Prime can bring a lawsuit against Famulus. That is not adequate or practical for a number

of reasons.

As GoodRx acknowledges, Prime and GoodRx negotiated a three-year term for its contract with 180-day notice of non-renewal. That contract is not up until September. There is a 30-day termination notice for breach, but Prime has not breached. So it has a negotiated 180-day notice of non-renewal. Famulus is contractually obligated to perform under that agreement through its term.

In the Fourth Circuit's case, Feller v. Brock, 802 F.2d 722, a Fourth Circuit case cited in the parties' briefing, the circuit court found that the district court abused its discretion in issuing a preliminary injunction that directly conflicts with another federal court's injunction.

So where does that leave Prime? If this injunction award is confirmed, we don't have a matter to practically seek recourse. It can't go into court and seek to enjoin breach of the agreement, to force compliance with the parties' agreement until September 21st, and/or enforce its 180-day notice period it bargained for. But then, according to GoodRx, Prime also can't intervene in this case. It practically impairs Prime's ability to protect itself if not allowed to intervene to challenge the injunction that is seeking to

be affirmed in this case.

And I know we already touched on this, but the no adequate representation. Mandatory intervention requires showing that Prime's interests are not being adequately represented. The Supreme Court recently re-emphasized --

THE COURT: Let me ask you --

MS. BARRAGRY: Yes.

THE COURT: -- as to the substantial interest argument, is there any Fourth Circuit case where a court has allowed intervention in such circumstances presented here upon a petition to vacate by a third-party who claims the remedies ordered by the arbitrator in an arbitration in which it was not a party will result in harm?

MS. BARRAGRY: So, Your Honor, I don't think that there is a case going either way in the Fourth Circuit, which is why you're seeing a lot of cases cited by both parties across the country on this issue. It is a very, very fact-specific issue. And I will admit, I don't think there is a case in front of you that is on all fours factually and legally. Legally, though, the principles that are set forth support intervention in this case.

There's one case in particular that I think I'm going to jump to because I think it's a good one in terms of emphasizing that -- there's an argument that's threaded

through GoodRx's briefing about standing. They challenge that we don't have a claim and then try to say that we can't have a claim overlapping in permissive intervention because we don't have a claim. Or they claim that we can't have an interest in this case because we don't have a legally protectable interest because we can't bring a claim under the FAA. So you kind of see it in a mandatory and permissive intervention argument. It's really a standing argument.

So the Maxim case, that's a Fourth Circuit case, actually says that legally protectable interest, you see that in other circuits, not in this circuit though, that's not what the standard is. It doesn't need to be a, quote, legally protectable interest. It needs to be a significantly protectable interest.

But then there's a case, a Supreme Court case. So this is the Trbovich v. United Mine Workers of America case, it's 92 S.Ct. 630. Now, Trbovich is relied on by the Fourth Circuit in Teague vs. Bakker, that's 931 F.2d 259. That's a Fourth Circuit case from 1991.

So this is a case, the Teague case is a case cited by both parties in their briefing. But then it relies on the Supreme Court case of Trbovich. As I was preparing for this hearing, I started looking at that case. And it's a great example of appropriate

intervention, even where an intervening party may not have independent standing, just as the argument is today, but under the FAA.

So in that case, the Secretary of Labor brought a lawsuit under the Labor Management Reporting and Disclosure Act to set aside the elections of officers of the union. Under the labor act at issue, the Secretary of Labor had the exclusive right to challenge a union election, and in fact did bring a lawsuit to challenge a union election. A union member sought to intervene to present evidence and argument in support of the secretary's election challenge. The district court denied the motion to intervene as a matter of right finding that the act only allowed the Secretary of Labor to bring the action, so the union member could not intervene.

That's the exact argument GoodRx makes as to why Prime cannot intervene. Because Prime wasn't a party under the FAA, it can't intervene because it can't seek to vacate. Well, in Trbovich, on appeal the Supreme Court reversed the district court's denial of intervention stating that while the labor act didn't make any -- the suit by the secretary, the exclusive post-election remedy, quote, in this case petitioner seeks only to participate in a pending suit that is plainly authorized by the statute. It cannot be said that his claim is defeated by

the bare language of the statute. The Supreme Court then went on applying Rule 24(a)(2), reversed the district's court's denial of the union member's motion for intervention and remanded it with the direction to allow limited intervention. So I think that case is really on all fours in terms of interpreting this FAA argument, that because we wouldn't independently have standing to seek to vacate does not mean we can't qualify under Rule 24 to intervene in an already existing motion to vacate, modify, or alter the award.

Just briefly on the no adequate representation. The Berger v. North Carolina State Conference of the NAACP, 597 U.S. 179, that's a Supreme Court case from 2022. And what that court said, the Supreme Court said are where parties interests are similar, but not identical, there is no presumption of adequate representation, and that the required intervenors demonstrate inadequate representation is a very minimal burden.

Courts will often look to whether the party is both capable and willing to make the same arguments as the proposed intervenor. And as we discussed, we think that Famulus does not have the incentive to look at the way that the injunction, if entered, would be entered.

Furthermore, Famulus doesn't have the access to

the harm that will incur to patients and to the health plans if this is entered. That is information that Prime has as the PBM acting on behalf of the health plans and these members.

For these reasons we believe Prime has established it has the right to intervene in this action and respectfully request the opportunity to do so. But if this Court finds mandatory intervention is not appropriate, permissive intervention would also be appropriate.

Federal Rule 24(b)(2) permits intervention if the application is timely, if the claim or defense have a common question of law or in fact, and if there's an independent basis of subject matter jurisdiction, and finally, intervention wouldn't unduly delay or prejudice the adjudication of rights. Under Fourth Circuit precedent, Backus v. South Carolina, 2012 WL 406860, intervention is to be construed liberally in favor of intervention.

So we already discussed the element of timeliness, so I'll move to the claim or defense must have a question of law or fact in common. Prime seeks to vacate, modify, or alter the injunction award which, obviously, shares common questions of fact with Famulus' motion.

And we already talked about the Trbovich case, but also it's worth pointing out again the Town of Chester v Laroe Estates, a Supreme Court case from 2017, where the Supreme Court instructed that a party seeking to intervene need only meet the requirements of Article III standing if it is pursuing relief that is different than requested by a party with standing. We're asking for relief under the same statute and sections that are already before Your Honor. So independent standing is not required in order to allow intervention.

As to the element of independent ground of subject matter jurisdiction, the only challenge GoodRx raised was to the issue of diversity of citizenship. As demonstrated in our responses to local interrogatories, full diversity of citizenship exists between Prime and GoodRx. As noted at the beginning, the bigger issue is I don't believe GoodRx or Famulus has established jurisdiction between themselves.

And the final element of permissive intervention is no undue delay or prejudice to the adjudication of rights. GoodRx never sought a preliminary injunction in the arbitration. And as you heard from the parties, GoodRx and Famulus jointly requested a continuance of the final hearing until just a few weeks ago, April 10th. Famulus has recently sought relief to amend or modify the

award requesting a briefing schedule on that issue. So we don't think that there's a genuine argument to any undue delay or prejudice by allowing us to intervene to speak to these very real, very personal issues as to the costs of medication to these members and health plans.

Prime will work cooperatively to meet a reasonable briefing schedule. And its intervention will not unduly delay or prejudice GoodRx. For these reasons and the alternative to mandatory intervention, we would respectfully request the opportunity to permissively intervene in this action.

Now, finally, as a third alternative, Prime requests amicus status. MedsYourWay will be completely shut down if Famulus is abruptly enjoined from supporting it. Prime, its members, and its clients are innocent victims in this commercial dispute. At a minimum, we respectfully request Prime be given the opportunity to submit an amicus brief on these very important issues.

Thank you, Your Honor.

THE COURT: All right. We're going to take a three-minute recess before we start your argument. Then we'll go into the motion to seal.

MS. CROZIER: Of course.

THE COURT: We'll be at recess.

(WHEREUPON, a short break was taken.)

THE COURT: Thank you. Take your seats, please. Yes, ma'am?

MS. CROZIER: Good afternoon, Your Honor, and thank you. Jennifer Crozier, Weil Gotshal and Manges on behalf of GoodRx, Inc.

Your Honor, I'd like to begin with Prime's argument with respect to subject matter jurisdiction. Famulus itself has asserted that there is complete diversity in this action in its amended petition in Paragraphs 1 and 3. In Paragraph 1, Famulus asserted that Famulus' members are citizens of South Carolina and Connecticut. And in Paragraph 3, Famulus asserted that there is complete diversity between the parties to this action. So the parties to the action, GoodRx and Famulus, agree that there is complete diversity. And this Court has held that subject matter jurisdiction exists under such circumstances; and that is the Nanopure against Pobiack (phonetic) case, 2021 WL 5903354 at 1, District of South Carolina, February 12th, 2021.

Even, however, if there were any doubt on that score, we can submit to Your Honor Good Roots filing with the Connecticut Secretary of State, its annual report that shows where the LLC is organized, the addresses of its registered agents, the address of its principals. And at least one court here in the Fourth Circuit has found that

sufficient to establish diversity jurisdiction, and that is Evans -- Evans, rather, against Centennial Holding, the 2021 WL 5893976 at 2, District of Maryland, March 25th, 2021. And I have that filing, Your Honor, if you'd like me to bring that up?

THE COURT: Sure. Do you have it for the other side?

MS. CROZIER: Yes.

THE COURT: Okay.

MS. CROZIER: And so again, Famulus itself has asserted that its members are citizens of South Carolina and Connecticut. And there's complete diversity here. GoodRx agrees. And on that basis the Court can determine that there is in fact subject matter jurisdiction.

Now, turning to the motion to intervene. I'll address each of Ms. Barragry's arguments in turn, but I'd like to begin with two fundamental principles which I think are dispositive of the issue here. First, under the plain terms of the FAA, Prime, a non-party to the underlying arbitration, may not intervene to move to vacate or modify or correct the award. Sections 10 and 11 both say that the district court may make an order vacating or modifying or correcting the award upon the application of any party to the arbitration.

Now, Ms. Barragry said that there's no Fourth

Circuit authority on point, but I would respectfully disagree. Your Honor can look at Jones against Dancel, 792 F.3d 395 at Page 401, Fourth Circuit, 2015. In that case, the Fourth Circuit stated, A district court must confirm an arbitration award unless a party to the arbitration demonstrates that the award should be vacated under one of the four enumerated grounds or for manifest disregard of the law.

So there really is, GoodRx would submit, only one outcome here. The party to the arbitration; that is, Famulus, has the heavy burden to show that the award should be vacated under the four statutory grounds or for manifest disregard of the law. Famulus itself cannot meet that burden. So under Jones against Dancel, which references the Supreme Court decision in Hall Street Associates, which Your Honor cited in your recent docket entry, this Court must affirm the award.

Nor can Prime intervene to litigate the merits of the underlying arbitration, including the scope and substance of the arbitrator's injunction. That has been done. It was done in the context of the arbitration. And as my colleague, Mr. Lender, spoke about earlier, the scope of review here is very narrow, among the narrowest known at law.

GoodRx would, therefore, submit that Prime

cannot establish a significantly protectable interest here and nor can it establish that it has a claim or defense that shares with this action a common question of law or fact. And the Court can and should deny the motion to intervene on those bases alone.

Now, to address Prime's arguments in both its reply brief and that of Ms. Barragry's presentation today. Prime first argues --

THE COURT: Let me ask you. Are you aware of any Fourth Circuit case denying intervention by a non-party who seeks to raise issues as to the harm it will suffer from the injunction ordered by the arbitrator?

MS. CROZIER: Any Fourth Circuit case that denies -- well, no, Your Honor, not standing here today. But again, the Fourth Circuit in Jones against Dancel said the court must confirm unless a party to the arbitration satisfies the four enumerated grounds in the FAA.

And I think, too, if we look at the cases that Prime cites in support of its argument, those cases prove GoodRx's point here. We can start with the Contracting Plumbers case, which is a Second Circuit case from 1988, 841 F.2d 461, cited by Prime in their reply brief at Page 4. In that case, the Second Circuit allowed a non-party to intervene to move to vacate only because the party faced an existential threat if it were not allowed

to intervene to move to vacate. And the Southern District of New York has since described that case as an outlier and talked about the fact that it should be applied only very rarely. Prime here doesn't articulate any such harm. It doesn't say that it itself is going to face an existential threat if not allowed to intervene to move to vacate.

Frere against Orthofix, 2002 WL 1543857 at 3, Southern District of New York, July 15th, 2002, cited by Prime in their reply brief at Page 4. The district court in that case relying on Contracting Plumbers, most of these cases are the fruit of Contracting Plumbers, merely assumed for purposes of a motion to vacate that non-parties have standing to intervene and then concluded that the non-parties failed to establish a credible basis for vacating the award.

THE COURT: Is there no threat to Prime from closure of the MedsYourWay program?

MS. CROZIER: No, Your Honor, there is not. Prime hasn't argued that it itself will go out of existence if MedsYourWay is enjoined. And let me talk about that point because we've heard a lot about it today. One thing I want to underscore is that what we're talking about here, this integrated cash solution, it's a drug discount coupon integrated with a patient's funded benefit

at the point of sale. So what we're talking about here is a coupon. You could hold one in your hand or you could use this integrated cash technology to integrate it with an insurance benefit at the pharmacy counter, which is what GoodRx does, and what Famulus learned to do based upon our confidential information.

So what Prime is really talking about here is that if the injunction is entered, it's members' coupons may run out. And some patients may have to pay more for their prescriptions than they were previously, consistent presumably with what they were paying before the program went into effect. That is far from the significantly protectable interest that's required under Rule 24(a). We are talking here about a coupon potentially running out.

And to address another argument that Ms. Barragry made, Prime has had more than enough time to prepare to shift away from its reliance on the technology that Famulus built based upon our confidential information. Prime has known about this dispute for at least seven months. And that's seven months to prepare for the possibility that Famulus might not be able to continue to serve Prime. And even now, it's been more than two months since the injunction became effective. And you have counsel for Prime standing up here saying there's nothing we can do.

But you heard Ms. Barragry admit that in the agreement between Prime and Famulus, they negotiated for a 30-day termination for cause and 180-days termination for convenience, which means that the parties themselves determined that six months would be enough in order to address any issues related to the stoppage of this program.

And so again -- and again, during the arbitration hearing, the arbitrator directly asked Mr. Szwajkos, What would happen if Famulus would be enjoined? And Mr. Szwajkos explained, and we cite to this in our papers, that other systems would kick back into place and Prime could return to its pre-Famulus status quo.

Now, I know that Ms. Barragry stood up here and said something different, Your Honor. But lawyer argument isn't evidence. And we presented substantial evidence in our papers of a whole mountain of evidence the arbitrator heard about Prime, about Prime's technology, about the relationship between Famulus and Prime. That wasn't the only evidence the arbitrator considered. There was a great deal of evidence considered. And we have a very long string cite in our brief with exhibits appended on Page 17 of our opposition to Famulus' motion to vacate.

Now, going back to whether Prime may intervene

to move to vacate, again, the cases -- the cases to which Prime cites in support of its argument, they prove our point. And the only two cases in which a non-party was actually permitted to intervene, again, one faced an existential threat and the other was liable for a million dollars as a result of the award. That's the new case that Prime cites, Westra Construction against Fidelity and Guarantee Co., 2006 WL 1149252 at Page 2, the Middle District of Pennsylvania, April 28th, 2006.

Now, Prime again argues that it need only show, pardon me, that it has a significantly protectable interest in these proceedings, not a legally protectable one. Three responses to that point, Your Honor.

First, we can point the Court to half a dozen cases here in the Fourth Circuit in which courts after Teague have required that proposed intervenors have a direct, substantial, and legally protectable interest. American College of Obstetricians against The United States, 467 F. Supp. 3d at -- 282 at 289, District of Maryland, 2020. City of Norfolk against Commonwealth of Virginia, 2020 WL 6330050 at 4, Eastern District of Virginia, January 10th, 2020. RLI Insurance Co. against Nexus Services, 2018 WL 5621982 at 3, Western District of Virginia, October 30th, 2018. Lantern Business Credit against Alianza Trinity Development Group, 2016 WL 6594117

at 3, Western District of North Carolina, October 11, 2016. Lewis against Excel Mechanical, 2013 WL 3762904 at 2, District of South Carolina, July 16th, 2013. And Genesis Press, Inc. against Mac Funding Corp., 2008 WL 4695114 at 1, District of South Carolina, October 23rd, 2008. So there are several cases that have held that a proposed intervenor must have a legally protectable interest in order to intervene.

Second, however, we state quite clearly in our opposition that Prime must have a significantly protectable interest. And then we go on to say that a significantly protectable interest is one that's direct, substantial, and legally protectable.

Now, our position is that's consistent with this Court's articulation of the standard in Bishop of Charleston against Adams, 2021, in which the court stated that a significantly protectable interest is one that is direct and substantial, and one where the proposed intervenor stands to gain or lose by the direct legal operation of the district court's judgment.

So when we say Prime must have a legally protectable interest, what we mean is that Prime itself must stand to gain or lose by the direct legal operation of the district court's judgment. Here, Prime has articulated no such harm. Prime can't credibly argue that

the fact that its members' coupons may run out, and that, again, that's what we're talking about here, gives it a legally protectable interest to intervene.

And then finally, Your Honor, whether one uses the term legally protectable or not, it doesn't matter because, again, Prime, as a non-party to the underlying arbitration, cannot intervene to move to vacate, modify, or correct the award. It can't intervene to relitigate the merits. So Prime, quite literally, has nothing to do in this vacatur confirmation action other than delay enforcement of the award. And the Court should therefore deny intervention.

Now, next Prime argues relying on Town of Chester against Laroe Estates, 581 US 433, 2017. Prime argues that it's not required to establish Article III standing because it seeks the same relief as Famulus. But in Town of Chester, the Supreme Court held that an intervenor of right must have Article III standing in order to pursue different relief from that which is sought by a party with standing.

Now, Prime argues that this holding necessarily means that a proposed intervenor need not demonstrate Article III standing so long as it's seeking the exact same relief as a party to the action. But a number of federal courts have pointed out, and I'll quote from one

decision, Your Honor, if I may, that the Supreme Court in Town of Chester did not consider whether all intervenors of right must demonstrate their own Article III standing. But instead, only considered whether an intervenor of right who seeks distinctive relief must demonstrate its own Article III standing. And that's Sierra Club against Entergy Arkansas, 503 F. Supp. 3d 821, at 849 to 50, Eastern District of Arkansas, 2020. And then also a similar conclusion in Old Dominion Electric Co-op against FERC, 892 F.3d 1223, 1232 to 33 at Note 2, the DC Circuit, 2018. And certiorari was denied in that case in 2019.

So our position is Prime must have standing to do something in this action, but it doesn't. It can't move to vacate. It can't relitigate the merits of the underlying arbitration. And it claims it isn't seeking to do anything else.

Now, again, Prime argues if it must establish standing, it can because it has standing to move to vacate the award. We've discussed that already. The cases upon which Prime relies are easily distinguishable and in fact prove GoodRx's point.

So I'll turn to Prime's next argument, which is that GoodRx is not entitled to a presumption of adequate representation. And that in any event, Famulus doesn't adequately represent Prime's interests.

Well, here, Your Honor, Prime is speaking out of both sides of its mouth. On the one hand in support of its standing argument, it says we seek the same relief as Famulus. That's in its reply brief at Page 2. On the other hand in support of its adequate representation argument, it says we seek relief that is different from Famulus or not identical with. That's in its reply brief at Page 5.

Prime can't have it both ways. Either it seeks the same relief and there's a presumption of adequate representation, in which case it would have to show adversity, collusion, and non-feasance, or non-feasance to overcome that presumption, or it seeks different relief. And under its own interpretation of the law, it has to establish standing.

In any event, even -- there's clearly adequate representation here. And I did want to address one comment that Ms. Barragry made. She said that the non-identical interest that it has in this vacatur confirmation action is that Famulus doesn't care about the injunction, only Prime cares about the injunction. But we just heard Ms. Farnsworth stand up and speak about the injunction for several minutes, including in a rebuttal presentation. So I think the suggestion that Famulus itself doesn't care about the injunction is belied by

Famulus' counsel's presentation to the Court today.

In any event, again, there's clearly adequate representation here. The parties have the same objective, which is to vacate, modify, or correct the award. They have the same arguments, which again, in our view are weak arguments. Because the arbitrator did hear significant evidence concerning Prime and its relationship with Famulus and its technology during the course of the arbitration. But again, the argument there is that somehow the arbitrator refused to consider information about Prime. That's not accurate. And they have the same perspective. Prime's perspective appears to be based on communications it's had with Famulus. Indeed, Famulus is better placed to make the arguments that Prime seeks to make because it was actually there during the arbitration proceedings and in the hearing. So again, Your Honor, we'd argue there's plainly adequate representation of interests here.

Now, next Prime argues that it would suffer great prejudice if it were not allowed to intervene. We've talked about that already. This is a drug discount program. The harm that Prime articulates -- the harm that Prime articulates is in our view remote and speculative. Because if the injunction is entered, and we submit it should be, then members' coupons may run out. Some

members may pay some amount more for their prescriptions for some period of time and, again, consistent presumably with what they were paying before.

I also do want to point out that although millions of patients have their prescriptions run through the MedsYourWay program, based on the evidence presented during the arbitration, only a small percentage actually receive their prescriptions at lower costs. So if you don't mind, I'll take a quick moment to talk about how this works.

So, the integrated cash program effectuates a comparison between a funded benefit and between a funded price and the discount price. And if the funded price is higher, then the discount price loses. If the discount price is lower, then -- make sure I'm -- if the discount price is lower than the funded price, we refer to that as a won claim, the claim is won by the discount card vendor. Not every claim is won by the discount card vendor. The evidence produced in the arbitration and heard during the arbitration indicates that only a very, very small number of claims are actually converted to the discount price from the funded price.

Okay. Finally, Your Honor, Prime argues that if the Court denies mandatory intervention, it should allow permissive intervention. And Prime articulates two, what

it refers to as, common questions of law or fact. First, whether the arbitrator committed misconduct by failing to consider evidence necessary to issue a fair and well reasoned award. And second, whether the arbitrator exceeded her powers by issuing an award that substantially impacts third-party rights. And that's at Prime's memorandum of law in support of its motion to intervene at Pages 20 and 21.

But Rule 24(b) permits intervention at the Court's discretion only where the proposed intervenor has a claim or defense it shares with the main action, a common question of law or fact. And these are not questions that relate to any claim or defense that Prime itself has. Prime is attempting to argue that the award or the injunction should be vacated pursuant to Section 10 of the FAA. And under the plain terms of the FAA, and we would submit the Fourth Circuit's decision in Jones against Dancel, it cannot do that. And so, accordingly, the Court should deny permissive intervention.

Beyond that, Your Honor, permissive intervention isn't appropriate if the intervention would delay the proceedings or prejudice the parties to the arbitration. And we haven't heard much about this today, but it's a really, really important point.

The arbitrator found that Famulus breached the

agreement between the parties by misusing our confidential information to develop a competing technology, which it then sold to Prime in violation of the exclusivity provisions of the agreement. The arbitrator, as Mr. Lender mentioned, awarded damages to remedy past harms and an injunction to prevent future harms.

Notwithstanding that injunction, notwithstanding those findings, Famulus continues to offer this, what I will call, a copycat technology to Prime today in violation of the injunction. And it continues to market its copycat technology on its website today in violation of the injunction.

So even though an arbitrator found that Famulus breached its agreement with GoodRx, Famulus continues to actively compete with us in the marketplace. Moreover, with each passing day, we suspect it will become more and more difficult to collect -- to enforce the award and to collect on the judgment or the award that the arbitrator issued.

Further, Prime's intervention would require GoodRx to address issues that it wouldn't have had to litigate otherwise. I've already stood up here and spoken to you about the nature of Prime's technology, and the harms to -- the potential harms to members, and the differences between the two technologies, how many are

actually getting savings under the drug discount coupon, the extent to which members are even aware of the benefit. You heard Ms. Barragry say most members aren't even aware that they're getting this benefit. These are all things that we wouldn't have to litigate otherwise. They really are not relevant at all to the Court's job here in this confirmation or vacatur proceeding. Again, we've got four narrow statutory grounds. We've got manifest disregard of the law. All of these issues are totally collateral issues. And GoodRx would be prejudiced to have to -- to litigate those here when it would not otherwise.

And then finally, I know I said finally before, but never trust a lawyer when she says finally, this is the last finally. With respect to the amicus brief, amicus briefs have been allowed at the trial level where they provide helpful analysis of the law, the amicus has a special interest in the subject matter of the suit, or existing counsel is in need of assistance.

Here, Prime does not and cannot offer -- or rather it does not purport to provide helpful analysis of the law. Vacating awards is narrow and that law is very well established. We submit Prime does not have a special interest because it cannot intervene to move to vacate and it cannot intervene to relitigate the merits of the underlying arbitration. And Prime hasn't suggested that

Famulus' counsel is in need of assistance.

And so, again, our position is intervening as an amicus here wouldn't be useful to the Court. And moreover, it would delay the proceedings and prejudice GoodRx for all the reasons that we've discussed. We have additional briefing. And so for all of those reasons, Your Honor, including those set forth in our papers, we submit that the motion to intervene should be denied.

(Pause.)

THE COURT: All right. So I'm going to try to organize the review of these documents. It's going to be a high level, not getting the into the weeds. And I'm going to ask y'all to group some of the arguments because, honestly, I don't have time to go into a whole lot of weeds here on these here this afternoon.

So I'm looking at Exhibit Nos. 2, 3, and 4. Can y'all -- do y'all have something there? Can y'all refer to your exhibit numbers? It's Entry No. 29-3 and it's filed by Famulus. Have y'all got that handy?

MS. FARNSWORTH: We didn't hear the first part of what you said, Your Honor. You said Famulus?

THE COURT: Famulus, yes. 29-3, the non-confidential exhibit index to Exhibit A. I'll let y'all find that.

So let me ask y'all this before we even -- does

Prime need to be excused because they weren't party to these -- I think Prime should probably be excused at this point because of the confidentiality.

MS. BARRAGRY: Understood, Your Honor.

THE COURT: And I'm done hearing their arguments. But if y'all have some argument that they need to stay here, I can't imagine what it would be.

MS. FARNSWORTH: I don't have any argument, Your Honor, unless you want to hear.

THE COURT: I'd love to have them. I could offer them some tea or a Coke or something like that. But I just don't see where there's any good reason for them to be here at this point. And I don't want to hear anymore argument on the motion to intervene.

MS. BARRAGRY: Understood, Your Honor.

MR. FLYNN: Thank you, Your Honor.

THE COURT: Thank y'all.

(Prime and their counsel left the courtroom.)

MS. FARNSWORTH: Your Honor, we have exhibit -- we have an Exhibit 4. We don't have a 29.3.

THE COURT: Entry No. 29-3 filed March 27th, 2024, motion to seal. I've got exhibit number, descriptions, ECF No. 29-3.

THE CLERK: It's Exhibit B.

MS. FARNSWORTH: To our motion to vacate?

THE COURT: I can show it to you if you want to come look at it. It's the second motion to seal that y'all filed.

MS. VRIESINGA: Yes, Your Honor.

THE COURT: Have y'all got it? Because I'm looking at it and I'm going to ask y'all to look at it.

MS. FARNSWORTH: Your Honor, we don't have a copy of it. We have it on our laptop somewhere.

THE COURT: All right.

MS. FARNSWORTH: But Ms. Vriesinga is prepared to address the motion to seal argument.

THE COURT: All right. I'm just trying to make sure everybody has something to look at if they want to.

MS. FARNSWORTH: We have everything else you could possibly want.

THE COURT: We're going to try to pull it up for you.

THE CLERK: Ms. Crozier, do you have the list?

MS. CROZIER: I do.

THE COURT: Okay. So got it there, Ms. Farnsworth?

MS. FARNSWORTH: I have an index of non-confidential exhibit index to Exhibit A, yes.

THE COURT: That's what I want to look at. And I want to ask y'all to confirm these are the documents or

not, that these are the documents that Famulus contends should be sealed and GoodRx says should not be sealed. Correct?

MS. VRIESINGA: That's correct. It's not all of the exhibits enumerated in the confidential index, it's some of them.

THE COURT: So these are the ones that I see are in dispute. And it would be Exhibit Nos. -- I'm doing them in groups, 2, 3, and 4, injunction order dated February 16, 2024. Y'all following me?

MS. VRIESINGA: Yes.

THE COURT: Costs ordered dated February 16, 2024, and consent protective order; correct?

MS. VRIESINGA: Yes.

THE COURT: Now I don't want to hear any argument yet. I want to jump down to Exhibit Nos. 11 and 12, consent scheduling order dated May 4th, 2023, and notice of hearing, Exhibit No. 12. Y'all following me?

MS. VRIESINGA: Yes.

MS. CROZIER: Yes.

THE COURT: And then Exhibit Nos. 20, 21, and 22. 20 is executed subpoenas dated November 10, 2023; consent scheduling order dated September 5, 2023; and No. 22 is consent scheduling order dated October 26th, 2023. Y'all see that?

MS. VRIESINGA: Yes.

THE COURT: Okay. And then next I've got Exhibit No. 31, arbitrator email of November 5, 2023, and Exhibit Nos. 37 and 38, arbitrator emails of November 15 and November 26, 2023.

Moving on to Exhibit Nos. 39 and 40, Prime letter of November 20, 2023, and No. 40, email thread of November 17, 2023, and November 20, 2023. Y'all agree that all those are in dispute?

MS. VRIESINGA: Yes.

THE COURT: Okay. And then No. 42, Puls' email of November 26th, 2023, correct? Y'all agree there?

MS. CROZIER: Your Honor, actually if I may? I think there's really only two documents that are in dispute here, and those are Exhibits 2 and 3. We only -- we only dispute that the injunction order and the costs order should be -- in our view they should be unsealed for reasons that we're prepared to argue. With respect to the rest of the documents, Your Honor has sealed them and we are fine if they remain under seal.

THE COURT: All right. I'm just trying to make the record clear; and that is, that the parties then agree based on our interaction now that Exhibits 1 through 63 all remain sealed except for No. 2 and 3. Is that where we're at?

MS. VRIESINGA: Subject to the Court's decision regarding No. 2 and 3.

MS. CROZIER: Yes, Your Honor.

THE COURT: In agreement? Okay then. All right. So I'll hear you on No. 2 and 3. Y'all can draw straws.

MS. CROZIER: All right, Your Honor, I will -- I will try to be brief. So there's a common law right to copy and inspect judicial records, In Re: Knight Publishing Co., 743 F.2d 231 at 235, Fourth Circuit, 1984. The district court may, however, in its discretion seal documents if the public's right of access is outweighed by competing interests.

Now, as a party seeking to seal these two documents -- and again the first document is the injunction order about which we've heard a fair amount today, and the second document is the costs order. As the party seeking to seal these documents, Famulus has the burden to show that the orders contain confidential information, that disclosure of them would harm them, and that that harm outweighs the public interest in access to the documents. And that's Virginia Department of State, 386 F.3d 567, Fourth Circuit, 2004.

Now, neither of these documents contains any highly confidential information that if disclosed to the

public would competitively disadvantage Famulus. The injunction order, which is Exhibit 2 on the list we were just referencing, it only states what Famulus must and must not do. There is no, and Famulus can point to none, confidential information in this document that if disclosed to the public would result in any harm to Famulus. The fact that the order indicates that Famulus has engaged in wrongdoing is not a basis to seal the document. And that's Tustin against Motorists Mutual Insurance Co., 668 F. Supp. 2d 755, the Northern District of West Virginia, 2009.

And the same is true with respect to the order granting GoodRx's motion for costs. Again, simply awarding costs, there is absolutely no highly confidential, competitively sensitive information in this document that outweighs the presumption of public access that attaches to these two documents.

Now, Famulus makes a number of arguments in an effort to keep these documents from the -- from public disclosure. And one of those is that these documents were governed by the parties' consent protective order that was entered in the underlying arbitration. But that is plainly not true. The consent protective order, which is Exhibit 4 in the index of documents that we were just referencing, by its very terms only applies to records of

information in this arbitration designated pursuant to this protective order, including all designated deposition testimony, all designated testimony taken at a hearing or other proceeding, all designated deposition exhibits, all documents produced, and other discovery materials including interrogatory answers, so on and so forth, which contain confidential, proprietary, or sensitive information.

THE COURT: Did I hear at the outset that it's your position that common law right of access applies to these two documents not the First Amendment right?

MS. CROZIER: Yes, Your Honor. And I would point -- I would point Your Honor to Blackbaud against IBM Corporation, 2021 WL 4776287 at 1, Southern District of New York, 2021. Petitions to confirm arbitration awards and their attendant memoranda of law and supporting documents are judicial documents that directly affect the court's adjudication of the confirmation petition and such documents are subject to the presumption of public access. And again, Famulus has the burden to show or to overcome that presumption of public access. And our position is that it has not. And the parties certainly didn't agree in the consent protective order that a costs order or an injunction should remain sealed on the public docket.

One additional argument, Your Honor, the

injunction by its own terms envisions that the outcome of the arbitration will be public. As Ms. Farnsworth referenced, the arbitrator directed Famulus to notify certain third parties that it was no longer permitted to offer its integrated -- it's fast technology. Again, something that we understand Famulus has not done. And to the extent we are going to enforce this award, Your Honor, these documents have to be public. The injunction has to be public in order for us to adequately enforce it. And again, the injunction itself contemplates that it would be public.

And finally, there is a significant public interest in this document and need for this information to be public. Because third parties, who are doing business with Famulus or who may be doing business with Famulus, have a right to know whether their mutual business activity is subject to the injunction.

Your Honor, subject to any questions you may have, I'm finished with that argument.

THE COURT: Hang on one second. So let me just ask you. Am I correct that you wouldn't agree to a less drastic remedy of redacting the parties named in Paragraph 8 of the injunction? (Pause.)

MS. CROZIER: As long, Your Honor, as we're still able to enforce that paragraph of the injunction by

ensuring that Famulus has in fact notified these entities that it's no longer permitted to offer its fast technology, then we would agree to that.

THE COURT: Well, they're required to notify you of the same per the arbitration ruling.

MS. CROZIER: That's right. So that would seem to be adequate under the circumstances.

THE COURT: And copy you on correspondence.

MS. CROZIER: That's right.

THE COURT: All right.

Yes, ma'am?

MS. VRIESINGA: Thank you, Your Honor.

THE COURT: I'd say good morning, but it's afternoon.

MS. VRIESINGA: Good afternoon. And thank you. On the issue of sealing, Famulus has filed two motions to seal in this case. One was in connection with its original petition to vacate. And then another was in connection with its amended petition to vacate. And together, with GoodRx, both parties have moved to seal in excess of a hundred exhibits in this case and for good reason. This is because the exhibits contain confidential information and/or they were generated during the course of an underlying arbitration proceeding, which was a confidential proceeding, and treated as such by the

parties from inception to completion without exception.

GoodRx now argues that certain exhibits are not confidential and should not be sealed. Specifically, it seems that the issues have been narrowed to the injunction order and the cost order. As a preliminary matter, this Court via Docket Entry Order 27 I believe in the GoodRx v. Famulus matter, directed the Clerk of Court to seal those very same exhibits. Those were Exhibits C and D to their petition to confirm.

But beyond that, the injunction order should be sealed because it does in fact contain commercially sensitive information as to Famulus, including its confidential business practices and confidential business relationships with a variety of third parties who are identified by name in the order and who in no way played a role or participated in the underlying arbitration proceeding. That is exactly the type of commercially sensitive confidential information that this Court has found to warrant sealing.

As an additional matter, these orders emanate, as I mentioned, from a confidential arbitration proceeding. That is part of what -- well, the pleadings, every basically exhibit in this case was marked confidential, if not highly confidential. No party deviated from the fact that they wanted this proceeding to

be confidential.

The fact that the FAA affords parties confidentiality and privacy protections is one of the things that attracts people to an arbitration proceeding in the first place. An arbitration proceeding contemplates that at the very end the winning or losing party is going to seek confirmation or vacatur of the award in a state or federal courts. So it doesn't render all of the confidential protections that were available to the parties during the arbitration and nullity because if that were the case, what's the point in having those protections in the first place?

Also, important here is the fact that these two exhibits are the precise exhibits in conjunction with the arbitration final award that Famulus is seeking to vacate and/or modify, either under Section 10 of the FAA or Section 11. The fact that these exhibits are the ones that Famulus is saying are invalid, they're invalid for all of the grounds set forth in its vacatur petition. We've asserted, I believe, four grounds under the FAA plus the common law man test disregard of the law (phonetic). Plus we filed a Section 11 challenge, which essentially GoodRx has conceded modification is necessary because there is an inconsistency when looking at the two documents specifically, the final award and the injunction

order.

And for that reason, these orders as they currently stand are just arbitration orders. They don't have any force and effect, as is noted in the final award itself, until they are confirmed in a court of competent jurisdiction. If in the event Famulus was successful in its vacatur action or modification action, and these awards are vacated or modified, there is no reason whatsoever to inject disinformation into the public domain at this point. The harm that will be suffered by Famulus is irreparable and can never be clawed back.

So for those reasons, Your Honor, we request that our motion to seal be confirmed in entirety, especially as it pertains to the two orders at issue.

THE COURT: One second. Let me just ask you what I asked counsel for GoodRx and that is this. Is it your position that the common law right of access applies and not the First Amendment right to all these documents you wish to seal?

MS. VRIESINGA: Your Honor, I would argue that the confidentiality provisions afforded by the AAA extend to this proceeding unless and until those filings, those orders are confirmed by this Court. For public policy reasons, that would be the reason to support sealing those documents at this juncture. They are subject to

challenge, a valid, legitimate challenge on behalf of Famulus that they are unenforceable. They are invalid. They should have never been written as they are. And as such, the public has no interest in seeing these orders until -- unless and until they are confirmed by this Court.

THE COURT: And as to the non-party, third-party names noted in Paragraph 8 of the injunction that you mentioned, GoodRx just confirmed on the record that they would agree to redact those names. So as to the injunction, do you all agree to this less drastic remedy or are you still arguing for sealing of the injunction in its entirety?

MS. VRIESINGA: We would still be arguing for sealing of the injunction in its entirety. It's not just the fact that the injunction order, I think it's somewhere towards the end of the order, identifies by name all of these relationships, these commercial business relationships that Famulus has with named parties that are subject to confidentiality provisions in their respective contracts.

But more than that, when you go to Paragraph 1 and 2 of the injunction order, the arbitration -- the order goes to great lengths describing Famulus' businesses practices. The first paragraph defines what's a

prohibited business. So what is Famulus doing that it can't do? And then it goes on and overbroadly defines what technology Famulus is offering in terms of solution.

So Paragraphs 1, 2, and then the paragraph dealing with the relationships with third parties would all have to be redacted. But that still doesn't alleviate the concern that the harm to Famulus should it prevail in its modification challenge or vacatur challenge could never be undone if it prevailed on those issues. That information would be out in the public domain and there would be no way to remedy the reputational damage to Famulus.

THE COURT: All right. Let me see if -- thank you -- if GoodRx has anything in response?

MS. VRIESINGA: Thank you.

MS. CROZIER: Your Honor, very briefly on whether the common law or First Amendment right of access applies. The first -- the Fourth Circuit has held that the First Amendment right of access most often applies in criminal proceedings, but it can apply in civil proceedings in connection with a summary judgment motion or at trial in a civil case. And that's why we contend, Your Honor, that the common law right of access applies here because GoodRx's petition to confirm the award does not relate to a motion for summary judgment.

If, however, the First Amendment right of access applied, it would even -- it would be even more difficult for Famulus to establish that these documents should be sealed. Because there, they would have to show a significant harm to outweigh this very significant right of access to this information.

And again, there's nothing, nothing in these documents that constitutes highly competitive, confidential information that, if disclosed, would somehow competitively disadvantage Famulus. You do hear Famulus asserting conclusorily that if this document were publicly disclosed it would result in irreparable harm. But there's been no specific indication of what that harm might be. And so Famulus cannot satisfy its burden as the moving party to show that these documents should be sealed and access to the public should be denied. Thank you.

THE COURT: Okay.

Thanks to everyone. I'm going to take it all under advisement. Appreciate all the great briefing, both sides arguing, and your general civility, at least as far as I can tell. I'll issue a written order at some point. Thank you.

MS. FARNSWORTH: Thank you, Your Honor.

MS. CROZIER: Thank you, Your Honor.

MR. LENDER: Thank you, Your Honor.

MR. LIVOTI: Thank you, Your Honor.

(WHEREUPON, court was adjourned at 1:25 PM.)

***

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Karen E. Martin 5/25/2024

Karen E. Martin, RMR, CRR Date